No. 91-1084

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PATRICIA COTLOW, PHILLIP KRASS, SHARON LACOMB, JAMES STEIN, AND THEODORE SUSS, INDIVIDUALLY AND ON BEHALF OF ALL CITIZENS OF MINNESOTA SIMILARLY SITUATED; JOAN GROWE, SECRETARY OF STATE OF THE STATE OF MINNESOTA; PATRICK O'CONNOR, HENNEPIN COUNTY AUDITOR, INDIVIDUALLY AND ON BEHALF OF ALL COUNTY AUDITORS OF THE STATE OF MINNESOTA; THE SEVENTY-SEVENTH MINNESOTA STATE HOUSE OF REPRESENTATIVES; AND THE SEVENTY-SEVENTH MINNESOTA STATE SENATE,

Appellants,

vs.

JAMES EMISON, JUDY FAIRBANKS, MARIE IVERSON, KEN DEAN, STEVE CASTILLO, LEW FREEMAN, AND YAO LO, INDIVIDUALLY AND ON BEHALF OF ALL CITIZENS AND VOTERS OF THE STATE OF MINNESOTA SIMILARLY SITUATED; DUANE BENSON, TERRY DEMPSEY, DELORES HETTIG, RICHARD HARMON, DAVID E. PETERSON, E.M. PATRICIA PIDCOCK, AND FRANK RINGSMUTH; AND MARK LUNDGREN, CARVER COUNTY AUDITOR, INDIVIDUALLY AND ON BEHALF OF ALL COUNTY AUDITORS OF THE STATE OF MINNESOTA,

Appellees.

Appeal from the United States District Court
for the District of Minnesota

APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO DISMISS APPELLANTS' APPEAL AND AFFIRM AND REINSTATE THE ORDER OF STAY

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On January 10, 1992, this Court vacated the order of stay from which this appeal arose. Appellees have now moved this Court to reconsider its January 10 order and to reinstate the order of stay issued by the United States District Court for the District of Minnesota. Appellants Joan Growe, Patrick O'Connor, the Seventy-seventh Minnesota State House of Representatives, and the Seventy-seventh Minnesota State Senate, (the "State Appellants") submit this brief in opposition to appellees' motion in order to address certain points which appellees raise which were not previously addressed in appellants' Jurisdictional Statement. Due to the time constraints inherent in the Court's expedited consideration of this appeal, the State Appellants' response addresses only those arguments raised by appellees in support of their motion not already addressed in appellants' Jurisdictional Statement.

1. The Primary Purpose of the District Court's Stay Order No Longer Exists

At pages 5-6 of their Motion to Dismiss, appellees characterize the purpose of the stay order issued by the District Court as follows:

> The District Court issued its August 21, 1991, Order and Memorandum to insure full compliance with the mandates of White v. Weiser, 412 U.S. 783 (1973), Scott v. Germano, 381 U.S. 407 (1965) and Reynolds v. Sims, 377 U.S. 533 (1964), by requiring judicial deference to the primary authority of the legislative process for valid redistricting plans. . . . The District Court concluded that all courts--state and federal--must defer until the legislature in its January 1992 session could addressredistricting. (Appellees' Motion to Dismiss at 5-6)

On January 9, 1992, the Minnesota Legislature passed two redistricting plans--one providing for congressional districts and the other adopting technical corrections to the legislative districts which were enacted in May 1991.[1] Minnesota Governor Arne Carlson vetoed both plans on January 10, 1992. The Legislature is now in recess until February 18, 1992. The leadership of the Legislature has given no indication that the Legislature will again take up redistricting during this session. Indeed, at the outset of the legislative session, the leadership announced that the redistricting issue would be addressed only during the first part of the session with the latter part of the session being devoted to other issues.

Because the Legislature is no longer considering redistricting, the matter is now appropriately before the courts. Thus, the primary justification offered by the District Court for its stay no longer exists.

2. Appellees' Attempt To Secure for the Federal Court Superiority Over the State Court in the Redistricting Process Is Contrary to Settled Law

The need for the judiciary to defer to the Legislature in the first instance with respect to the establishment of a redistricting plan is not at issue. The State Appellants do notdispute that legislatures have the primary responsibility for

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[1] Appellees obscure the fact that the Minnesota Legislature enacted a legislative redistricting plan in May 1991. Although certain sections of the plan were held to be unconstitutional, due to errors in accurately describing the boundaries of the districts, the state court held that the plan, when properly construed, required only minimal, technical corrections. See App. A-259.

establishing a reapportionment plan. The State Appellants contend only that state, rather than federal, courts have the primary responsibility for reviewing whatever plan emerges from the legislative process and establishing plans in the absence of appropriate legislative action. The issue here presented then is not the proper relation between the state court and the state legislature, but rather the proper relation between the state court and the federal court. In this regard, appellees' argument that federal courts have the inherent authority to pre-empt the state courts' role in redistricting is contrary to this Court's pronouncements on the subject.

Appellees' treatment of the leading case on the issue of parallel state and federal redistricting challenges, Scott v. Germano, 381 U.S. 407 (1965), illustrates the overall weakness of their position. Appellees' primary discussion of Germano occurs in its argument that the District Court's stay was necessary in aid of its jurisdiction under the Anti-Injunction Act. See Motion to Dismiss at 5-6. In this regard, appellees argue that the procedures adopted by the District Court are "consistent with this Court's directive in Germano" because the Court in Germano recognized that if the state did not develop a valid redistricting plan "within a reasonable time," the federal court could act. In particular, appellees rely on the following quote from Germano:

> The District Court shall retain jurisdiction of the case and in the event a validreapportionment plan for the state senate is not timely adopted it may enter

> such orders as it deems appropriate including an order for a valid reapportionment plan . . . .

Appellees' Motion to Dismiss at 8, quoting Germano, 381 U.S. at 409-10 (emphasis supplied by appellees).

Appellees' reliance on the quoted excerpt from Germano is misplaced. The recognition in Germano of the federal court's right to act if the state were unsuccessful in timely adopting a valid reapportionment plan does not establish that the federal court has the inherent authority "in aid of its jurisdiction" to preempt the state court from taking any role in the redistricting process. To the contrary, the Court in Germano clearly recognized that a state's judiciary has the power to adopt a redistricting plan: "The power of the judiciary of a State . . . to formulate a valid redistricting plan has not only been recognized by this Court . . . [but has been] specifically encouraged." Id. at 409. The Court then went on to direct the District Court in the case before it to fix a reasonable time in which the state agencies, including the state supreme court, could redistrict the state. Id. Only after this direction did the Court direct the District Court to retain jurisdiction and authorize it to enter orders if a valid redistricting plan was not adopted. Id. at 409-10. In these directions, the Court clearly contemplated that the state supreme court might be the state agency that adopted the redistricting plan. Thus, Germano properly stands for the proposition that the federal court should

only "enter such orders as it deems appropriate" where the state, including its courts, is unable to create a valid redistricting plan.

In this case, Minnesota, through its Special Redistricting Panel, has already adopted a valid legislative redistricting plan. See App. A-259. In addition, the Special Redistricting Panel is proceeding to adopt a congressional redistricting plan, now that the Legislature has failed to enact a plan. Therefore, there is no need for the federal court to enter an order in aid of its jurisdiction because Minnesota is perfectly capable of creating valid redistricting plans in accordance with Germano.

Appellees' reading of Germano would render Germano at odds with Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engr's, 398 U.S. 281 (1970), in which this Court expressly rejected the argument that a federal court may enjoin a state court from acting under the "aid of jurisdiction" exception to the Anti-Injunctive Act simply because parallel actions are proceeding in both federal and state courts. The Court rejected the argument even where resolution of the matters by both courts would be inconsistent and unworkable. Id. at 295-96. As stated by the Court in Atlantic Coast Line, even where state court proceedings "interfere with a protected federal right or invade an area pre-empted by federal law," a federal court "does not have inherent power to enjoin state court proceedings." Id. at 294. Instead, as the Court held subsequently in Chick Cam Choo

v. Exxon Corp., 486 U.S. 140, 149-50 (1980), the issue of federalpre-emption must be raised in the state court in the first instance and the state court should determine the limits of its own jurisdiction.

3. The District Court's Order of Stay Can Not be Sustained on Grounds That It Was Necessary in Aid of the Court's 1982 Redistricting Orders

Apart from their argument that the District Court's Stay Order was properly issued in aid of the District Court's 1991 jurisdiction, appellees argue that the District Court's order of stay was also necessary in aid of its ongoing jurisdiction derived from the 1982 federal redistricting action. Appellees place great weight on language in both LaComb v. Growe, 541 F. Supp. 145 (D. Minn.), aff'd sub nom. Orwoll v. LaComb, 450 U.S. 966 (1982) (LaComb I), and LaComb v. Growe, 541 F. Supp. 160 (D. Minn. 1982) (LaComb II), enjoining state election officials from conducting congressional and legislative elections "under any apportionment plan except that which we adopt today or a constitutional plan adopted after this date by the State of Minnesota," LaComb I, 541 F. Supp. at 151; LaComb II, 541 F. Supp. at 167 (emphasis supplied).

Appellees' argument, however, makes one fatal assumption. Appellees assume that the only redistricting plan that would satisfy LaComb I and LaComb II is one that the Minnesota Legislature enacts. See Motion to Dismiss at 10 ("[N]o subsequent constitutional plan has been adopted by the state of Minnesota.") Germano, however, unquestionably recognizes that

Minnesota's courts may adopt redistricting plans. To the extentthe LaComb I and LaComb II injunctions are ongoing, they dissolve the moment Minnesota, through its state legislature or its state judiciary, adopts constitutional redistricting plans. Such a legislative plan has been adopted. Therefore, contrary to appellees' assertions, the District Court's stay is not necessary to protect ongoing federal jurisdiction under the 1982 redistricting orders.

CONCLUSION

For the reasons set forth in appellants' Jurisdictional Statement and for the reasons stated herein, appellees' motion to reinstate the order of stay should be denied. The State Appellants further urge the Court to reaffirm its earlier order with directions to the United States District Court to defer to the pending and active state court proceeding. Such an order would provide guidance to the parties and the courts in Minnesota and would help prevent the issuance of competing plans by the state and federal courts.

DATED: January 23, 1992

Respectfully submitted,

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